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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION

11 CHASOM BROWN, WILLIAM BYATT,
12 JEREMY DAVIS, CHRISTOPHER
13 CASTILLO, and MONIQUE TRUJILLO
14 individually and on behalf of all other
15 similarly situated,

16 Plaintiffs,

17 v.

18 GOOGLE LLC,

19 Defendant.

20 Case No. 5:20-cv-03664-YGR-SVK

21 **JOINT CASE MANAGEMENT
STATEMENT**

22 Judge: Hon. Yvonne Gonzalez Rogers
Courtroom 1 – 4th Floor
Date: January 30, 2023
Time: 2:00 p.m.

1 Pursuant to the Court's December 12, 2022 Order (Dkt. 803), and in advance of the Case
 2 Management Conference set for Monday, January 30, 2023, at 2:00 p.m., Plaintiffs and Defendant
 3 Google LLC submit this Joint Case Management Statement. The previous Joint Case Management
 4 Statement is Dkt. 397.

5 **1. JURISDICTION AND SERVICE**

6 Google has been served and the Court has jurisdiction over this matter.

7 **2. FACTS**

8 The parties' prior Joint Case Management Conference Statements and class certification
 9 briefing include summaries of the principal factual issues in dispute.

10 **3. LEGAL ISSUES**

11 Plaintiffs moved for class certification of a nationwide class based on seven causes of action:
 12 (I) violation of the Federal Wiretap Act, 18 U.S.C. § 2510, et. Seq.; (II) violation of CIPA; (III)
 13 violation of CDAFA.; (IV) invasion of privacy; (V) intrusion upon seclusion; (VI) breach of
 14 contract; and (VII) violation of California's UCL. The Court certified two classes under Rule
 15 23(b)(2):

16 Class 1 – All Chrome browser users with a Google account who accessed a non- Google
 17 website containing Google tracking or advertising code using such browser and who were
 18 (a) in “Incognito mode” on that browser and (b) were not logged into their Google account
 19 on that browser, but whose communications, including identifying information and online
 20 browsing history, Google nevertheless intercepted, received, or collected from June 1, 2016
 through the present.

21 Class 2 – All Safari, Edge, and Internet Explorer users with a Google account who accessed
 22 a non-Google website containing Google tracking or advertising code using such browser
 23 and who were (a) in a “private browsing mode” on that browser and (b) were not logged into
 24 their Google account on that browser, but whose communications, including identifying
 25 information and online browsing history, Google nevertheless intercepted, received, or
 26 collected from June 1, 2016 through the present.

27 ***Plaintiffs' Statement:***

28 All seven of Plaintiffs' legal claims are well supported by the evidence, including what
 Plaintiffs had previously filed showing Google's own acknowledgment of the lack of consumer
 understanding or actual choice with respect to the illegal conduct at issue in this case. Additionally,

1 Google cannot account for all of the ways that it uses private browsing data (the subject of the
 2 pending sanctions before Magistrate Judge van Keulen), which is further evidence that Google has
 3 not obtained consent. Plaintiffs disagree with Google's mischaracterization that the Court's ruling
 4 in *Calhoun v. Google, LLC*, 2022 WL 18107184 (N.D. Cal. Dec. 12, 2022), which does not factually
 5 or legally apply to this case. As noted below, there are outstanding legal issues regarding the impact
 6 of Google's discovery misconduct, with another pending order to show cause, and also with respect
 7 to tolling for purposes of any claims for monetary relief. For purposes of the certified injunctive
 8 relief classes, Plaintiffs are evaluating ways to streamline these proceedings, including with
 9 Plaintiffs seeking relief by way of summary judgment and/or disposition in advance of trial,
 10 including by moving on Google's aforementioned admissions, Google's inability to produce
 11 evidence to contradict prior rulings, and certain elements of Plaintiff's specific causes of action.
 12 Plaintiffs dispute that Google is entitled to any relief based on any consent defense, consistent with
 13 the thorough analysis included in the prior motion to dismiss rulings.

14 ***Google's Statement:***

15 All claims should be dismissed at summary judgment because the class consented to the data
 16 collection, including by consenting to Google's Privacy Policy and the Account Holder Agreements.
 17 In *Calhoun v. Google, LLC*, 2022 WL 18107184 (N.D. Cal. Dec. 12, 2022), which challenges the
 18 identical data collection, this Court held that the Privacy Policy and Account Holder Agreements
 19 disclose the data collection. *Id.* at *11-13. Plaintiffs fail to identify any disclosures, agreements or
 20 representations in which Google somehow negated that consent. Summary judgment is also
 21 warranted because Plaintiffs have failed to prove the elements of their claims, and for other reasons
 22 that will be explained in Google's forthcoming motion for summary judgment.

23 **4. MOTIONS**

24 Motions Decided Since the Last Joint Case Management Conference Statement (Dkt. 397)

25 The Court granted Plaintiffs' motion for leave to amend their complaint to modify their class
 26 definitions, Dkt. 504, granted in part and denied in part Google's motion for relief from non-
 27 dispositive pretrial order re: Sundar Pichai and Lorraine Twohill, Dkt. 523, granted in part and
 28 denied in part Plaintiffs' administrative motion to set hearing date, Dkt. 729, and granted in part and

1 denied in part Plaintiffs' motion for class certification, related *Daubert* motions, and Plaintiffs'
 2 motion to strike declarations, Dkt. 803. Magistrate Judge van Keulen ruled on numerous discovery
 3 disputes. Dkts. 418, 437, 447, 450, 454, 468, 480, 487, 505, 515, 522, 541, 542, 567, 588, 602, 604,
 4 605, 624, 626, 630, 631, 647, 657, 758, 763, 777, 788, 830. Magistrate Judge van Keulen also issued
 5 orders related to the ongoing Special Master discovery proceedings. Dkts. 524, 587. The Court and
 6 Magistrate Judge van Keulen ruled on various motions to seal (Dkts. 420, 502, 540, 611, 674, 724,
 7 728, 738, 760, 766, 768, 770, 789, 804), the Court granted motions for admission *pro hac vice* (Dkt.
 8 497, 547), and the Court issued orders appointing commissioners pursuant to the Hague Convention
 9 (Dkt. 479, 601).

10 Pending Motions

11 Plaintiffs have moved for additional discovery sanctions (Dkt. 656) and a hearing is set for
 12 March 2, 2023 (Dkt. 784). Google filed its response on December 1, 2022 (Dkt. 798) and Plaintiffs
 13 filed their response on January 20, 2023 (Dkt. 834). Google filed an administrative motion for leave
 14 to deprecate on December 21, 2022 (Dkt. 810), and Plaintiffs filed their response on January 4, 2023
 15 (Dkt. 816). Plaintiffs filed their Motion to Clarify that All Statutes of Limitation Remain Tolled
 16 based on the Court's recent class certification order. Dkt. 832. Seven motions to seal remain
 17 outstanding. Dkt. 781, 797, 799, 805, 809, 815, 817.

18 Anticipated Motions

19 ***Plaintiffs' Statement:***

20 Plaintiffs anticipate moving for summary judgment and/or disposition on certain claims,
 21 defenses, and/or issues. Plaintiffs have familiarized themselves with Section 9 of the Court's June
 22, 2022 Standing Order in Civil Cases and will abide by that Standing Order (as reflected in the
 23 proposed case schedule below).

24 ***Google's Statement:***

25 Google anticipates moving for summary judgment on all or some of the claims and defenses.
 26 Google has familiarized itself with Section 9 of the Court's June 22, 2022 Standing Order in Civil
 27 Cases and will abide by that Standing Order (as reflected in the proposed case schedule below).

1 **5. AMENDMENT OF PLEADINGS**

2 Pursuant to stipulation of the parties, Judge Koh previously granted Plaintiffs' request for
 3 leave to file their Second Amended Complaint. Dkt 138; Dkt 136-1 ("SAC"). The Court also granted
 4 Plaintiffs motion for leave to file a Third Amended Complaint. Dkt. 504; 395-2 ("TAC").

5 **6. EVIDENCE PRESERVATION**

6 The parties reviewed the ESI Guidelines and conferred regarding evidence preservation. The
 7 parties previously agreed to and the Court entered a protective order (Dkt. 81) and an ESI order
 8 (Dkt. 80), and the ESI order was subsequently modified by the Court (Dkt. 91).

9 ***Plaintiffs' Statement:***

10 On October 27, 2022, Google moved for relief from the Court's current preservation orders,
 11 with Google seeking to delete certain matching and linking tables that were never provided to
 12 Plaintiffs during discovery and the Special Master process. Dkt. 782. Plaintiffs opposed that motion
 13 on December 1, 2022, explaining that Google had never shared details of these matching and linking
 14 tables, and that the declarations submitted by Google were vague and provided insufficient details
 15 for Plaintiffs, the Special Master, or the Court to quantify any prejudice that would result from any
 16 deletion. Dkt. 800. Google replied on December 15, 2022. Dkt. 806. The parties also submitted a
 17 joint letter brief regarding the effect of the Court's Class Certification Order on Google's
 18 preservation obligations. Dkt. 818.

19 On January 10, 2023, Magistrate Judge van Keulen held a hearing regarding these
 20 preservation issues, during which Google's counsel admitted that Google has not been preserving
 21 these matching and linking tables. Judge van Keulen denied without prejudice Google's request to
 22 delete all of the preserved data (at issue in Dkt. 818). Judge van Keulen ordered that Google's
 23 engineers and Plaintiffs' experts meet to review the details of the matching and linking tables and
 24 discuss any prejudice resulting from their deletion. The parties are scheduling that discussion and
 25 will provide an update to the Court on January 31, 2023. Dkt. 830.

26 ***Google's Statement:***

27 On October 27, 2022, Google moved the Magistrate Judge for relief from preservation of
 28 six mapping and linking tables. Dkts. 782. The Parties also submitted a joint letter brief regarding

1 the effect of the Court's Class Certification Order on Google's preservation obligations. Dkt. 818.
 2 Magistrate Judge van Keulen held a hearing on Google's motions on January 10, 2023, at which she
 3 confirmed that Google only has to preserve tables needed to work with the data at issue Hr'g Tr.
 4 8:4-6 ("I think I was clear on the record that if the table is needed to work with any of the data at
 5 issue, it has to be preserved."). On January 17, 2023, Magistrate Judge van Keulen ordered the
 6 parties to meet and confer regarding preservation related to the six tables, and denied Google's other
 7 requests without prejudice to renewal of those requests after the Ninth Circuit rules on Plaintiffs'
 8 Rule 23(f) petition. Dkt. 830.

9 **7. DISCLOSURES**

10 The parties exchanged initial disclosures on September 8, 2020. Plaintiffs served amended
 11 disclosures on March 16, 2021 and second amended disclosures on March 4, 2022. Google served
 12 amended disclosures on February 21, 2022.

13 **8. DISCOVERY**

14 Fact discovery closed on March 4, 2022 and expert discovery closed on August 25, 2022.
 15 The Court's Order granting in part and denying in part Plaintiffs' Motion for Class Certification,
 16 granting in part *Daubert* motions, and denying Plaintiffs' motion to strike Google's non-retained
 17 experts also ordered Google to make four employees available for deposition (Dkt. 803), and the
 18 parties agreed for those depositions to be completed by February 17, 2023, Dkt. 808. After meeting
 19 and conferring, the parties agreed to defer one of those depositions (Mr. Levitte), with the parties
 20 agreeing that deposition would proceed if at some point (on Plaintiffs' Rule 23(f) petition or
 21 otherwise) aggregate damages calculations are decided in this action.

22 **9. CLASS ACTIONS**

23 On June 20, 2022, Plaintiffs moved for class certification. Dkt. 609. On December 12, 2022,
 24 the Court granted in part and denied in part Plaintiffs' motion for class certification. Dkt. 803. On
 25 December 23, 2022, Plaintiffs filed a Petition for Permission to Appeal under the Federal Rule of
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 27
 28

1 Civil Procedure 23(f). *See* Dkt. 812. The Ninth Circuit has not yet issued a ruling on that Petition.
 2 Counsel for the parties have reviewed the Procedural Guidance for Class Action Settlements.

3 **10. RELATED CASES**

4 The parties are not aware of any related cases or proceedings pending before another judge,
 5 court, or administrative body.

6 **11. RELIEF**

7 ***Plaintiffs' Statement:***

8 The operative complaint includes Plaintiffs' requested relief, which includes without
 9 limitation the injunctive relief detailed by the Court in the certification ruling.

10 ***Google Statement:***

11 The Court certified a class under Rule 23(b)(2) only. Google will address Plaintiffs'
 12 requested injunctive relief when appropriate.

13 **12. SETTLEMENT AND ADR**

14 No settlement discussions have taken place. Pursuant to ADR Local Rule 3-5 and Civil Local
 15 Rule 16-8, on August 19, 2020, the parties met and conferred regarding the available dispute
 16 resolution options and filed their respective ADR Certifications. The parties do not believe that ADR
 17 is appropriate at this time.

18 **13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

19 The parties have not consented to have a magistrate judge conduct all further proceedings.

20 **14. OTHER REFERENCES**

21 Apart from the current Special Master process, the parties do not believe the case is suitable
 22 for reference to binding arbitration, a special master, or the JPML.

23 **15. NARROWING OF ISSUES**

24 The parties will work together to see if there are issues that can be narrowed by agreement
 25 or otherwise to expedite the presentation of evidence at trial.

26 **16. EXPEDITED TRIAL PROCEDURE**

27 The parties believe this case should not be handled under the Expedited Trial Procedure of
 28 General Order No. 64 Attachment A.

1 **17. SCHEDULING**

2 On December 12, 2022, the Court ordered the parties to meet and confer on a schedule for
 3 the balance of the action. Dkt. 803. On December 19, 2022, the Court vacated previous deadlines as
 4 to summary judgment, and ordered the parties to include their proposal in this statement. Dkt. 808.
 5 The parties jointly proposed the following case schedule:

Action	Deadline
Last Day to Submit Letter Requesting Pre-filing Conference	March 13, 2023
Last day to File Response to Letter Requesting Pre-filing Conference	March 16, 2023
Pre-filing Conference	March 22, 2023
Motion for Summary Judgment	Motion: March 28, 2023 Opp'n: May 26, 2023 Reply: June 23, 2023
Summary Judgment Hearing	July 11, 2023
Last Day to serve (but not file) motions in limine; last day to exchange exhibit lists	September 22, 2023
Last day to meet and confer re: Pretrial conference statement	September 29, 2023
Pretrial Conference Statement; Last Day to File Motions in Limine	October 6, 2023
Oppositions to Motions in Limine	October 11, 2023
Joint Trial Readiness Binders	October 13, 2023
Pretrial conference	October 20, 2023
Trial	November 6, 2023

21 **18. TRIAL**

22 ***Plaintiffs' Statement:***

23 Plaintiffs currently estimate the trial in this case to last approximately
 24 15 days.

25 ***Google's Statement:***

26 It is premature to determine whether any claims will survive summary judgment and will be
 27 resolved by a jury.

1 **19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

2 The parties previously filed their certificates of interested entities (Dkt. 14, 52) and have no
3 updates.

4 **20. PROFESSIONAL CONDUCT**

5 All attorneys of record for the parties have reviewed the Guidelines for Professional Conduct
6 of the Northern District of California.

7 **21. OTHER MATTERS**

8 None.

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1 DATED: January 23, 2023

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ATTESTATION

I, Andrew H. Schapiro, hereby attest, pursuant to N.D. Cal. Civil L.R. 5-1, that the concurrence to the filing of this document has been obtained from each signatory hereto.

DATED: January 23, 2023

By: /s/ Andrew H. Schapiro
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